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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/689,957	10/12/2000	David Murray Melrose	31060.800US01	7844
23935	7590	02/11/2005	EXAMINER	
KOPPEL, JACOBS, PATRICK & HEYBL 555 ST. CHARLES DRIVE SUITE 107 THOUSAND OAKS, CA 91360			MEREK, JOSEPH C	
			ART UNIT	PAPER NUMBER
			3727	

DATE MAILED: 02/11/2005

Please find below and/or attached an Office communication concerning this application or proceeding..

## Office Action Summary

Application No.

09/689,957

Applicant(s)

MELROSE

Examiner

Joseph C. Merek

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 17 November 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 27-39, 41-52, 55-63, 65-70 and 76-82 is/are pending in the application.
- 4a) Of the above claim(s) 43-46, 49, 50, 55-63, 69 and 70 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 27-39, 41, 42, 47, 48, 51, 52, 65-68 and 77-82 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/17/04 has been entered.

### ***Election/Restrictions***

Applicant's request that the examiner reconsider the election of species has been considered. Applicant has not presented any evidence in support of their request. Therefore the previous restriction has been maintained.

The examiner has reviewed the amendment to claim 80 that requires the initiator region is located between two flexure regions. This appears to read on the non-elected species of Figs. 7 or 8. The elected embodiment is represented in Fig. 1-5. The examiner requests that applicant explain how this claim is supported by Figs. 1-5. Figs. 1 and 2 appear to have only one flexure region identified by numeral 5. If applicant cannot provide an adequate showing and support that this claim is directed to the elected embodiment, then the examiner will withdraw the claim in the next office action.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claim 47 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Regarding claim 47, it has not been adequately disclosed that the "initiator region being displaced nearer the center of the flex panel than either longitudinal end". The specification of the instant invention states on page 8 in the first two lines, "the initiator portion may be located substantially towards a center of said flexible panel". This does not support the above claim language. This is a new matter rejection.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application

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by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claims 27-39, 41, 42, 47, 48, 51, 52, 65-68, and 77-82 are rejected under 35 U.S.C. 102(e) as being anticipated by Krishnakumar et al (US 5,971,184). Regarding claims 27, 37, 45, 47, 48, 64, 65, and 68, see Figs. 1-7, where the panel 56 is shown which is outward and then inverts inward. The area around the edge is the initiator and the center is the flexure. The initiator does not extend outward as much as the flexure. The flexure and the initiator regions curve in both the transverse and the longitudinal directions where the curvature of the initiator is less than that of the flexure. The container is bi-axially oriented, made for hot fill, and blow molded. The area around the panel is substantially inflexible as seen in Fig. 4 as item 52. This part 52 does not move during the change. The panels will respond gradually to the change in pressure since the containers cool gradually and the pressure change is gradual. See Fig. 4, where the progressive movement is shown. Regarding claim 29, the curvature of the flexure region decreases as you pass the center of the panel. The initiator panel surrounds the flexure panel. Regarding claim 42, since the area around the panel move inward an increase in pressure will cause them to move outward. Regarding claim claims 77-80,

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see the discussions of the previous claims above. Regarding claims 81 and 82, the land areas are the sections of the container walls that join the vacuum panels. The flexure region has a greater arc length than the initiator region.

Claims 27-39, 41, 42, 47, 48, 51, 52, 65-68, and 77-82 are rejected under 35 U.S.C. 102(b) as being anticipated by Weckman (US 4,387,816). Regarding claim claims, 27, 37, 47, 48, 64, 65, 68, 71-73, 77, and 80, see Figs. 5-9, where the claimed structure is shown. Fig. 5 specifically, the initiator region is located at the top of panel near lead line 92. The flexure region is located towards the bottom of the panel. There are different curvatures displaced from each other. The panel is capable of inverting due to the hinges 92. See Col. 6, lines 45 and 46 where it is stated that the panels collapse slowly inwardly. See also Col. 4, lines 21-26 where inward label bowing is discussed. The vacuum panel is the label panel. Regarding claims 81 and 82, the land areas are the sections of the container walls that join the vacuum panels. The flexure region has a greater arc length than the initiator region.

### ***Response to Arguments***

Applicant's arguments filed 11/24/03 have been fully considered but they are not persuasive. Applicant argues with respect to the reference to Krishnakumar et al '184 that the bottle cannot function in a gradual manner. This is incorrect. Fig. 4 shows at least two positions 56' and 56"" which are in response to vacuum. This satisfies the claim limitation of progressively. As seen in Fig. 6, there are portions of the panel that are spaced or displaced from each other that have different curvatures. There is a

portion of the panel that is towards and end of the panel that extends less than a portion of the panel that is towards the other end of the container. Applicant argues that the initiator region of the reference has a smaller radius of curvature than the flexure region and therefore has an increased amount of arc. This is improper for several reasons. This first is that there is nothing in the claim that equates the amount of arc with the radius of curvature. Applicant's own specification on page 14 in line 5, equates the amount of arc with the amount of projection from the plane. The examiner has pointed out that the each region has an arc length, which is an amount of arc. The length of the arc of the initiator section is less than the arc length of the flexure region. This is apparent from the Figs. 1 and 6 of the reference, the width of the elliptical panel is less at or near the end than the area that is just up from this location. Additionally the initiator region projects outward less than the flexure region. The claim requires that the two regions be towards an end of the panel. The region for the flexure region includes the central portion of the panel, which has a longer arc than initiator region, which is in the narrower portion of the upper end of the panel. The flexure region approaches the lower end of the panel. This satisfies the claim limitation. The second reason is that applicant's analysis of Fig. 6a and 6b of the Krishnakumar is improper. See *Nystrom v Trex*, 71 USPQ 2d 1241 (Fed Cir. 2004) "Arguments for anticipation based on drawings not explicitly made to scale in issued patents are unavailing, since precise proportions cannot be read into patent drawings which do not expressly provide such proportions. Applicant is trying to elicit exact numerical relationships from the drawings in the Krishnakumar et al '184 reference. With respect to the Weckman reference, as seen in

Figs. 5, 6, 8, and 9, the initiator portion of the panel which is at the upper end where the cut line for Fig. 8 is shown in Fig. 5 and the flexure region is at the other end at the cut line for Fig. 9. As seen in Fig. 8 and 9, the initiator portion has a shorter length of arc or a lesser amount of arc and than the flexure region. Applicant argues that it is an optical illusion that the amount of arc in the upper end of the panel. By applicant's own drawing on page 33 of the response filed 11/17/04, a line is drawn that exceeds the actual length of the arc along the panel surface on which is the initiator region. It is clear that the length of the arc drawn by the line drawn on the representation of Fig. 8 exceeds the length of the container sidewalls. It appears that what applicant is arguing that the radius of curvature of each of the two parts of the vacuum panel of the instant invention is different. This is made clear in the applicant's arguments with respect to the Krishnakumar reference where applicant infers from his interpretation of the drawings of the reference that the radius of curvature is the same for the initiator and the flexure regions. This is not required or specified in the claims. The claims require that the "initiator region has a lesser amount of arc projecting away from said plane" do not specify what the amount of arc that is being claimed. It is the examiners position that the length of the arc is an "amount" of the arc and therefore satisfies the claim limitation. It is clear from viewing Fig. 5 that the width of the panel (92) at cut line 8 is much less than the width of the panel (92) at the cut line 9. Both the initiator and the flexure regions project away from the central longitudinal axis of the bottle. As seen in Fig. 6, the lower part of panel 92 projects farther away from the axis than the upper part of the panel. In response to applicant's argument that the references fail to show certain



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features of applicant's invention, it is noted that the features upon which applicant relies (i.e., that the panel has no curvature in the vertical direction, that the curvature is uniform along a single plane) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

### ***Conclusion***

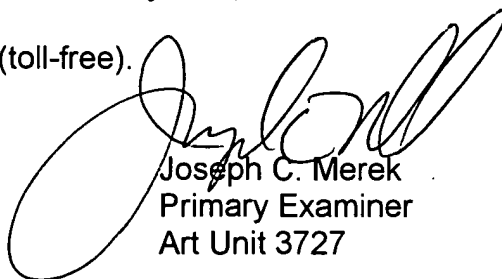
The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Melrose et al (US 6,779,673) is cited for having initiator and flexure regions.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Joseph C. Merek whose telephone number is 571 272-4542. The examiner can normally be reached on Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lee Young can be reached on (571) 272-4549. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Joseph C. Merek  
Primary Examiner  
Art Unit 3727